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No. 80-2141

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF TENNESSEE, ET AL., PETITIONERS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
STUART E. SCHIFFER
Acting Assistant Attorney General
ROBERT E. KOPP
MARY A. MCREYNOLDS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. (Supp. III) 11503, which prohibits states from taxing or assessing railroad property at levels significantly higher than other commercial and industrial property, requires the State of Tennessee to alter the taxing scheme it applies to railroad property within that state.

2. Whether Section 306 of the Act is a proper exercise of Congress' power to regulate interstate commerce.

3. Whether Section 306 of the Act violates the Tenth Amendment.

4. Whether Section 306 of the Act was intended by Congress to apply to the 1979 tax year.

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. A-1 to A-2) is unreported. The opinion of the district court (Pet. Supp. App. A-1 to A-23) is reported at 478 F. Supp. 199.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1981 (Pet. App. A-1). The petition for a writ of certiorari was filed on June 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional and statutory provisions are reprinted at Pet. App. A-17 to A-28.

STATEMENT

1. Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976, Section 101(a), 45 U.S.C. 801:

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy * * *.

A primary cause of the economic difficulties of the nation's railway system was discriminatory taxation of railroad properties by state taxing authorities. The problem was described clearly by the House Committee that reported the Act as follows:

> [R]ailroads are over-taxed by at least $50 million each year. In view of the generally poor economic condition of the railroad industry and the effect such economic hardship is having on the ability of the industry to adequately serve our national rail transportation needs, the Committee believes discriminatory property * * * taxation should be ended.[1]

H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 78 (1975).

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[1] Congress has stated that discrimination against railroads through onerous property taxes "has long been a well-recognized problem." H.R. Rep. No. 94-725, 94th Cong., 1st Sess. 76 (1975). See also S. Rep. No. 92-1085, 92d Cong., 2d Sess. 4 (1972); S. Rep. No. 1483, 90th Cong., 2d Sess. 4 (1968); S. Rep. No. 445, 87th Cong., 1st Sess. 462 (1961).

Section 306 of the Act was adopted to eliminate this problem. Among other things, it prohibits states from assessing "rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property." 49 U.S.C. (Supp. III) 11503(b)(1). In order to ease the effect on state revenues that Section 306 might cause, Congress delayed the effective date of the provision for three years until February 5, 1979. This lead time was intended to allow "the twenty-one or more states likely to be affected to change their practices." H.R. Rep. No. 94-725, *supra*, at 76.

At the time of the adoption of the Act, the State of Tennessee assessed "public utility property" at "fifty-five percent of its value" (Tenn. Const., Art. II, § 28), and other "industrial and commercial property" at forty or thirty percent (*ibid.*). The state legislature classified railroad company property as "public utility property." Tenn. Code Ann. § 67-601 (7)(1) (repl. 1976).

2. Instead of changing the classification of railroad property to "industrial and commercial property," the State and various public officials (petitioners herein) filed this suit against seventeen railroad companies in the United States District Court for the Middle District of Tennessee. They requested a "declaratory judgment * * * that section 306 * * * is compatible with Tennessee's property tax classification system" or "[i]n the alternative, * * * that section 306 is unconstitutional on the grounds that Congress exceeded its power under the Commerce

Clause * * * as limited by the Tenth Amendment" (Pet. Supp. App. A-2 to A-3). Petitioners also contended, in the alternative, that even if the Act was constitutional and required the State to change its taxing scheme, it was not intended to apply to the 1979 tax year (*id.* at A-19).

The United States was allowed to intervene to defend the constitutionality of Section 306 of the Act. The United States and the railroad companies filed counterclaims seeking, *inter alia*, a declaration that the Tennessee property tax as applied to the railroads was contrary to Section 306 and therefore was void (Pet. Supp. App. A-4). The United States and the railroad companies also contended that Section 306 was intended to apply to the 1979 tax year (*id.* at A-19).

All parties filed cross motions for summary judgment (Pet. Supp. App. A-4). The district court granted defendants' motions, denied petitioners' motions, and entered judgment for defendants (*id.* at A-1 to A-2). The district court held: (1) Tennessee's property tax classification scheme plainly violated Section 306 (Pet. Supp. App. A-4 to A-6); (2) Section 306 did not violate the Tenth Amendment as interpreted by this Court in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976) (Pet. Supp. App. A-6 to A-16); (3) Section 306 was a permissible exercise of Congress' Commerce Clause powers (Art. I, Sec. 8, Cl. 3) (Pet. Supp. App. A-16 to A-19); and (4) Congress intended Section 306 to take effect in the 1979 tax year (Pet. Supp. App. A-19 to A-21).

The court of appeals "affirmed for the reasons set forth in the opinion of the District Court" (Pet. App. A-2).

ARGUMENT

1. Petitioners invite this Court (Pet. 16) to avoid addressing their constitutional arguments by construing Section 306 to allow Tennessee to continue assessing railroad property at the same ratio that it assesses property of other public utilities (Pet. 14-16). Petitioners ignore, however, their burden to show that this interpretation of the statute is at least "fairly possible." *Machinists* v. *Street*, 367 U.S. 740, 749 (1961), quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); see also *Yu Cong Eng* v. *Trinidad*, 271 U.S. 500, 518 (1926). The statutory language is unambiguous in requiring rail property to be assessed at the same ratio as "commercial and industrial property." 49 U.S.C. (Supp. III) 11503(b)(1). Nothing in this language supports the limiting construction suggested by petitioners. See *Arizona* v. *Atchison, T. & S.F. Ry.*, No. 79-3183 (9th Cir. June 12, 1981), slip op. 2856. Moreover, as the district court's opinion demonstrates (Pet. Supp. App. A-6), the legislative history "leaves no doubt but that the federal law would serve to abrogate Tennessee's classification scheme."[2]

2. Petitioners argue (Pet. 12-14) that Section 306 is an improper exercise of Congress' power to regulate interstate commerce. To determine whether the statute is within the commerce power, petitioners urge this Court to apply the two-part test announced in *Hewlett-Packard Co.* v. *Barnes*, 425 F. Supp. 1294,

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[2] Senator Baker of Tennessee opposed Section 306 on the ground that its adoption "will require the State of Tennessee to reduce the level of assessment of railroads and other interstate carriers from 55 percent to 40 percent." 121 Cong. Rec. 42205 (1975). See also *id.* at 36092 (remarks by Sen. Baker).

1300 (N.D. Cal. 1977). Under this test, a court must decide whether Congress rationally concluded that a given activity adversely affects interstate commerce and whether Congress has adopted a reasonable means to eliminate the effect of that activity on interstate commerce. See *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241 (1964).

Assuming, for purposes of argument, that this is a proper formulation of the constitutional standard, it is clear that Section 306 satisfies both elements. First, even though the railroad property in question is inside the State of Tennessee, it is part of an interstate railway system and therefore the State's tax does have a significant effect on interstate commerce. *Perez* v. *United States*, 402 U.S. 146 (1971); *Heart of Atlanta Motel* v. *United States*, *supra*; *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

Second, Congress' legislative findings regarding the effect of discriminatory state taxes on railroads (see page 2, *supra*) demonstrate, contrary to petitioners' assertion (Pet. 13), that the reduction of these state taxes is a reasonably necessary means to protect this essential form of interstate commerce. Courts have no power to second guess such congressional determinations. See *Stafford* v. *Wallace*, 258 U.S. 495, 521 (1922). To the extent any advantage is thereby given to railroads over other common carriers, this was a permissible response by Congress to the special problems of the nation's railway systems.

3. Nor did Congress violate the Tenth Amendment of the Constitution as interpreted in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). This Court has repeatedly recognized that Congress has broad

power to limit state taxation that affects interstate commerce. *Arizona Public Service Co.* v. *Snead*, 441 U.S. 141 (1979); *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267, 280 (1978); *State Board of Insurance* v. *Todd Shipyards Corp.*, 370 U.S. 451, 456 (1962); *Freeman* v. *Hewit*, 329 U.S. 249 (1946); *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945); *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292 (1944).[3]

This Court has not, however, indicated what, if any, limits the Tenth Amendment places on Congress' power to regulate taxation of interstate commerce. That some limit may exist was suggested in dicta in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 434 (1946) (emphasis added), where the Court described Congress' power over commerce in the following terms:

> That power does not run down a one-way street or one of narrowly fixed dimensions. Congress may keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and *the requirement*

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[3] Justice Jackson's concurring opinion in *Northwest Airlines* emphasizes Congress' nearly absolute control over the taxation of interstate commerce (322 U.S. at 303-304):

> Congress has not extended its protection and control to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax-free altogether.

that it shall not invade the domains of action reserved exclusively for the states.

Moreover, regulation of state taxing schemes might arguably satisfy the threshold requirements for a Tenth Amendment claim announced in *Hodel* v. *Virginia Surface Mining & Reclamation Association*, No. 79-1538 (June 15, 1981), slip op. 21.

Even assuming that these threshold requirements are satisfied, however, this Court made clear in *Hodel* that a Tenth Amendment challenge cannot succeed in a case such as this. *Hodel* v. *Virginia Surface Mining & Reclamation Association*, *supra*, slip op. 21 n.29. The necessary process of balancing state and federal interests demonstrates the permissibility of federal regulation here. See *Fry* v. *United States*, 421 U.S. 542 (1975); *National League of Cities* v. *Usery*, *supra*, 426 U.S. at 856 (Blackmun, J., concurring).

The district court carefully balanced the relevant state and federal interests before holding Section 306 was constitutional. It recognized a strong federal interest in revitalizing the nation's railroad system, which was in a crisis situation. It found the State's interest to be less weighty in view of the fact that Section 306 is limited to lowering assessments, not eliminating taxes. Moreover, the provision applies to only one type of property. See *Freeman* v. *Hewit*, *supra*, 329 U.S. at 253. Thus, Section 306 in no way undermines the State's ability to collect revenues from other sources or forbids the state to increase railroad assessments so long as the State treats railroad and industrial and commercial property alike. The district court's analysis is fully consistent with *National League of Cities* v. *Usery*, *supra*, and with the only other court of appeals' decision on this issue.

Arizona v. *Atchison, T. & S.F. Ry.*, *supra*, slip op. 2859-2861.

Petitioners also appear to argue (Pet. 10) that Congress cannot invalidate the Tennessee tax because the only limitations upon Tennessee's taxation powers are those "contained in the Due Process and Equal Protection Clauses of the Fourteenth Amendment and [imposed] by the prohibition of taxing interstate commerce under the Commerce Clause," and that "Tennessee's system of taxing railroads has been constitutionally upheld" in *Louisville & N. R.R.* v. *Atkins*, 390 F. Supp. 576 (M.D. Tenn. 1975). However, petitioners cite nothing to support their novel contention that Congress, in the exercise of its Commerce Clause power, may do no more than eliminate those state-imposed burdens on interstate commerce that independently violate the implied limitations on state taxation in the Commerce Clause. As the Ninth Circuit held in *Arizona* v. *Atchison, T. & S.F. Ry.*, *supra*, slip op. 2857:

> In the realm of interstate commerce, it is one thing to say that a state statute passes constitutional muster in the absence of congressional legislation, and quite another to say that the same state statute may stand in the face of a conflicting law enacted by Congress. * * * Congress's power is not limited to curing constitutional defects.

See also *Arizona Public Service Co.* v. *Snead*, *supra*, 441 U.S. at 151-152 (Rehnquist, J., concurring).

4. Finally, petitioners maintain (Pet. 16-18) that Section 306 was not intended to apply to the 1979 tax year, since the February 5, 1979, effective date falls after Tennessee's January 1 completion of the 1979 tax year assessment process (Pet. Supp. App.

A-19). The courts below correctly rejected that contention (Pet. App. A-2; Pet. Supp. App. A-21), as did the only other court to have considered the same question. See *Alabama Great Southern R.R.* v. *Eagerton*, 472 F. Supp. 60 (D. Ala. 1979).

As the district court explained (Pet. Supp. App. A-21):

> To make section 306 applicable for the first time to the 1980 tax year for which taxes are not due until 1981, more than five years after the enactment of section 306, and more than two years after its effective date, is contrary to the three-year phase-in plan of Congress. Such a construction frustrates the congressional purpose in fixing the effective date of section 306.

The district court's analysis of this question, which may be unique to Tennessee and Alabama and affects only a single taxable year, is reasonable and does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

ROBERT E. KOPP
MARY A. MCREYNOLDS
Attorneys

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